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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 469

BRADFORD TOWNSHIP, et al.,

Petitioners,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

DAVID LINCOLN ADER, Esq.
233 East Walton Place
Chicago, Illinois 60611
312-337-6285 or 312-726-4904
Attorney for Petitioners

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

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REPLY BRIEF FOR PETITIONERS

[All italics ours; (App.) means Appendix to Petition; (R. App.) means Appendix from Court of Appeals.]

I.

PETITIONER HEREIN SETS FORTH NUMEROUS SPECIAL AND IMPORTANT REASONS FOR THE ISSUANCE OF CERTIORARI AND REVIEW BY THIS COURT.

Respondents clearly err in stating that Petitioners have made no attempt to propound any special or important reasons for granting certiorari. Their error is easily estab-

lished, since this Court in its rules and decisions has established a definition of what is important for a grant of certiorari and Petitioners case touches all of the criteria set forth therein.

Rule 19 1(b) of the Rules of the Supreme Court of the United States provides that it is important to the grant of certiorari that the Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeals. Such a conflict exists here. Under both Arguments I and II of the Petition herein the decision of the Seventh Circuit has been shown to be in conflict with that of the First, Third, Sixth, Ninth, Tenth and District of Columbia Circuits and thus this case qualifies for certiorari.

This rule also provides that an important issue is stated for certiorari when a Court of Appeals has decided a federal question in conflict with the applicable decisions of this Court. In Arguments I and II of the Petition more than twenty Supreme Court decisions are recited to demonstrate how the Seventh Circuit has disregarded and contravened Supreme Court decisions by its decision in this case and thus Petitioners have shown this case to be important for the granting of certiorari.

The same rule provides that an issue shall be deemed important when the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of the supervision of this Court. Petitioners have demonstrated in Argument II of the Petition that the Court of Appeals for the Seventh Circuit ignored and contravened the well established rules of statutory interpretation established by this Court and rendered provisions placed in the body of Title I of the National

Environmental Policy Act, 42 U.S.C. §4331 (App. 18a-20a) null and unenforceable.

The said rule also provides that where an important issue of federal law which should be settled by this Court has not been so settled the issue is deemed important for the granting of certiorari. The nation is presently concerned about an environmental crisis. Congress too was concerned by this crisis and therefore enacted the National Environmental Policy Act. Congress found the state of the environment and its continued degradation a serious menace to the country and declared protection and enhancement of the environment important necessities. This case involves the same important issues of environmental degradation and calls for an immediate interpretation of this important Act of Congress. Congress intended and was confident that it had enacted legal, effective and enforceable provisions. The Court of Appeals for the Seventh Circuit, on the other hand, has ruled contrary to the concerns of the Act, contrary to the rules of statutory interpretation established by this Court, and contrary to the legislative history of the Act, thereby rendering entire sections of Title I of the Act legally ineffective, meaningless and unenforceable. The Seventh Circuit's decision could mislead other tribunals of this nation in a matter of grave national concern by its contravention of the wishes of Congress and its variance with the welfare of the nation. This Court is respectfully urged to interpret this Act and settle the law in this field so that unnecessary and irreparable harm is not done to this nation's environment in future years.

These are all important issues raised throughout the Petition for certiorari.

II.

ALL OF RESPONDENTS' CITATIONS ARE CLEARLY DISTINGUISHABLE FROM THIS CASE.

Respondents' opposition to the Petition for Certiorari is clearly without support and Respondents are reduced to seeking to distract this Court from the facts and issues herein by innuendo.

First, Respondents claim repeatedly that the Meetings of Public Agencies Act, 102 Ill. Rev. Stat. §42, does not apply because the Act exempts meetings concerning the acquisition of real property. This exemption has no bearing on the instant case because it applies only to those meetings in which specific parcels of land are marked for acquisition or condemnation proceedings are authorized. The Illinois State Toll Highway Authority or any other governmental body covered by the Act cannot hide its proceedings in closed sessions simply because of the possibility that at some future time presently undetermined parcels may be needed if the policy proposal to build a project is passed. The policy decision for expanding a toll highway system is a policy decision which must be made in a public meeting as is any decision to increase bonding of the toll highway system. The fact that certain acquisitions of real property or increased indebtedness may ultimately be required to expand a toll highway system cannot be used as an excuse to hold such policy meetings in secret which the legislature obviously provided should be open to the public. The decisions of the court below in no way rests on any claimed exemption nor even mentions such exemption.

The decisions below which Petitioners seek to have reviewed by this Court hold that the violation of the state

law alleged in the complaint may be actionable under state law but does not give rise to a federal cause of action. The decisions concern only the question of whether due process was violated because the required public meetings were not held and the proceedings which contravened the Open Meetings Act resulted in a taking and damaging of the property and environmental rights of Petitioners.

Respondents attempted to raise the statutory exemption before the Court of Appeals for the Seventh Circuit which did not consider the contention worthy to remark upon in its opinion. Not only is that contention irrelevant to the present review of the decision of the United States Court of Appeals for the Seventh Circuit, but it is also clearly out of order in this appeal. First, it is not mentioned by either of the courts below and at most is a question on the merits at trial. Because of this excursion by Respondents, Petitioners are compelled to state that if this case goes to trial Petitioners will prove that the meetings complained of were to make policy decisions determining first, whether an extension to the present Illinois State Toll Highway system should be built at all, and second, whether the bonded indebtedness of the Authority should be increased by $135,000,000. These meetings were held six months before any meeting to select, designate and approve any land for acquisition.

Furthermore, it is clear that whether the meetings are within or without the exemption is solely a matter for trial, because the factual content of the meetings determines whether the exemption is applicable. In their complaint Petitioners stated that meetings which should have been open were held secretly in violation of the Open Meetings Act, and on Respondent's motion to dismiss these allega-

tions must be taken as true. *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932) (R. App. 10).

Respondents also attempt to convince this Court that decisions which do not concern an imposed limitation upon the State's exercise of eminent domain apply to this case. Not one of Respondent's cases deals with statutory restrictions on the state's eminent domain power. For eminent domain to be used in the State of Illinois it must be for a lawfully conceived project and in strict compliance with the law. *Department of Public Works* v. *Ryan*, 357 Ill. 150 (1934); *South Park Comn'rs* v. *Ward & Co.*, 248 Ill. 299 (1910). Petitioners allege in their complaint that the project was illegally conceived in violation of statute and that said Toll Highway Authority has proceeded in violation of law. These facts make this case clearly distinguishable from *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill. 1955), which arose and was decided prior to the Meetings of Public Agencies Act. *Rindge* v. *Los Angeles County*, 262 U.S. 700 (1923), supports the general rule that where a sovereign has not provided limitations on its power of eminent domain, a position quite different from that at bar, the common law and Constitution in the absence of such a statute do not of their own require a public hearing.

The case of *Harrison-Halsted Community Group* v. *Housing & Home Finance Agency*, 310 F. 2d 99 (7th Cir. 1962) and *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967) were attempts to enjoin state eminent domain because of failures to hold public hearings required under federal regulations controlling the procedure for granting federal money to projects. No question of state law was raised, argued or mentioned but the viola-

tion was solely of a federal requirement under federal funding regulations. Had an injunction been sought against federal funding rather than against the eminent domain power which existed independently of the federal financing the results would probably have been different. See Pet. 17. No state public meetings requirements were raised in those cases.

In the case at bar, however, state public meeting requirements are raised based on the Meetings of Public Agencies Act of Illinois which was vastly amended and expanded in June 1967 to cover for the first time *all* state agencies including the Illinois State Toll Highway Authority, Respondent herein. It is because of this state agency's violation of a state statute requiring public meetings at which the policy decisions to extend the toll highway system and to finance such an extension with bonds that state eminent domain proceedings should be enjoined. This state agency cannot violate state restrictions on its power of action which will take Petitioners' property and destroy their environmental rights without violating federal due process.

Each of the cases cited by Respondents concern an entirely different fact situation from that in the present case and Respondents can prove nothing relevant to this case by their citation of these authorities. In contrast, Petitioners have cited several decisions of this Court and of other circuits in which the question of a state's violation of a self-imposed restriction was found to violate federal due process under the Fourteenth Amendment to the United States Constitution. Because the Seventh Circuit's decision contravenes those relevant decisions of this Court and of other circuits it is respectfully urged that this Court grant certiorari and vindicate the authority of its decisions and

protect against encroachment of the federal due process rights of Petitioners.

III.

PETITIONERS' DEMONSTRATION, THAT THE DECISION BELOW WAS RENDERED IN CONTRAVENTION OF THIS COURT'S WELL-SETTLED AUTHORITIES AND THE DECISIONS OF OTHER CIRCUITS, IS ACKNOWLEDGED BY RESPONDENTS' SILENCE ON THIS ISSUE, AND FURTHERMORE, RESPONDENTS' ARGUMENT TO THE MERITS IS NOT ONLY IMPROPER AT THIS TIME BUT UNCONVINCING.

Whether the National Environmental Policy Act (NEPA) applies to the state agency and the individual Respondents in this suit is not an appropriate issue on certiorari but rather is a matter which goes to the merits of the case. However, since Defendants do raise this matter, Petitioners are compelled to reply.

The District Court and the Seventh Circuit disregarded this Court's numerous precedents concerning the proper canons of statutory interpretation, and thereby rendered a large portion of the body of Title I of NEPA meaningless and unenforceable surplusage. Respondents nowhere treat Petitioners' cases, and it is therefore starkly apparent that the relevant law of this Court has been ignored and its authority contravened. Respondents conveniently avoid this serious issue, and instead try to distract this Court from a proper consideration of the issues concerning certiorari by making certain premature assertions concerning the merits. Although Petitioners know that this Court will not be led astray by this tactic, and although these matters will be expounded upon when the merits are reached if this Court grants certiorari, Petitioners believe that they are compelled to out-

line their position briefly and to indicate the errors in Respondents' position.

First, Defendants misstate to this Court that the word "state" is not mentioned in Section 101 of NEPA, 42 U.S.C. 4331. This is simply untrue. It can be found clearly in Subsection (a) (App. 18a) of the said Section where Congress provides that the states should cooperate in the fulfillment of the national policy therein announced. Not only does the word "state" appear, contrary to Respondents' assertion, but the Environmental Quality Improvement Act which is an act *in pari materia* clearly states that the responsibility of implementing the national policy is on the state and local governments (App. 20a). In addition, a duty was clearly placed on the individual Respondents under Subsection (c) to protect and enhance the environment for the Petitioners' and other citizens' benefit.

The duty-creating words appear in the body of Title I of NEPA. This section is not an introduction to the Act. The introduction appears in Section 4321 of NEPA which comes before the designation Title I, and Petitioners do not rely upon Section 4321 for it simply conveys what Congress intends to accomplish in the titles which follow. Title I then follows, and in the body of Title I is Section 4331 which contains the pronouncement of a national policy for the protection and enhancement of the environment and for duties toward and rights in the environment. This policy and its attendant rights and duties come within the purposes set forth in Section 4321. Petitioners rely on Section 4331 which was intended by Congress to be an integral and effective part of Title I. (App. 18a-20a).

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936), relied upon by Respondents, is clearly distinguishable from the case at bar. Whereas the section relied upon by Petitioners in the case at bar affirmatively pronounces a national policy and uses duty and right-creating words, the section of the Bituminous Coal Conservation Act of 1935, 49 Stat. 991 (1935), interpreted in the *Carter* case did no more than list the evils which Congress identified as those which induced it to pass the substantive provisions of that Act.

Second, Respondents erroneously claim that NEPA only created a policy and is thus unenforceable. But policy is law, as this Court has held many times. *Morayne* v. *States Marine Lines,* 398 U.S. 375, 390-1 (1970); *Van Beeck* v. *Sabine Towing Co., Inc.*, 300 U.S. 342, 351 (1937); *accord*: *Johnson* v. *U. S.*, 163 Fed. 30, 32 (1st Cir. 1908) (Mr. Justice Holmes speaking for the Court and often quoted by the United States Supreme Court). Once Congress chooses and announces a policy it is the specific duty of the courts to give that policy effect. *Tag* v. *Rogers,* 267 F. 2d 664, 668 (D.C. Cir. 1959).

Respondents' third contention is equally at variance with the authority of this Court and with those canons of statutory interpretation which Petitioners seek to have vindicated here. Respondents attempt to have considered as a legitimate source of legislative history the comments of individual senators and representatives (see Res. Brief, pp. 24 and 29). This is against the holding of this Court and not competent evidence of the intention of Congress. *Maxwell* v. *Dow,* 176 U.S. 581, 601-2 (1900). Based on the comments of individual senators and rep-

resentatives setting forth their personal views in debate or in hearings, Respondents with this Court to isolate and ignore and render ineffective and unenforceable the whole of the first section appearing in the body of Title I of NEPA contrary to the plain and common meaning of the words used in that section. This Court has held many times that sections of acts should not be rendered unenforceable and that cases coming clearly within the terms of an act should not be exempted therefrom based on innuendo and remote inferences. *Ex parte Public Bank*, 278 U.S. 101, 104 (1928); *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1928); *Carter's Heirs* v. *Cutting & Wife*, 12 U.S. (8 Cran.) 251, 252 (1814).

Fourth, contrary to the plain meaning of the words used in the first section of Title I of NEPA, 42 U.S.C. §4331, Respondents maintain that the Act is addressed solely to the federal government. There is a difference, however, in the meaning of the words "national policy" which embraces the nation as a whole from that of a "federal policy" which is addressed to the federal government alone. See *U. S.* v. *Georgia Public Service Comm'n*, 371 U.S. 285, 292-3 (1963); *Public Utilities Com'n of California* v. *U. S.*, 355 U.S. 534, 544 (1958). The organization of Section 4331 also clearly demonstrates that the policy is national in scope. Subsection (a) states that the cooperation of the states is expected in effectuating the national policy, and the Environmental Improvement Act, 42 U.S.C. §4371, an act *in pari materia* declaring the same national policy, states, "The primary responsibility for implementing this policy rests with the State and local governments." 42 U.S.C. §4371. Subsection (b) is addressed to the federal government.

Subsection (c) clearly states that "each person has a responsibility to contribute to the preservation and enhancement of the environment." The fact that the next section of Title I spells out specific procedures for the federal government in order for that government to meet its responsibilities under the national policy does not make the duty of States and individuals ineffectual. Congress has two roles, one as a national legislature and the other as organizer and supervisor of federal governmental operations. In enacting Section 4331 Congress performed its role as the national legislature declaring a policy for the nation as a whole. In the second section of Title I, Congress acted in its second role as organizer and rule maker for the federal government, by prescribing specific procedures which the federal government must observe to comply with the policy set forth in Section 4331. The subparts of Section 4331, the first section in Title I, affecting States and individuals are left to the rule of reason. The fact that the report of the Senate Committee on Interior and Insular Affairs (S. 1075) cited by Respondents states that it was hoped that the second section of Title I would provide a model for state governments can only mean that the States might strengthen the national policy and comply with it by establishing similar procedural requirements. Without such procedural requirements the rule of reason still exists, and unreasonable and irresponsible disregard and destruction of the environment is an actionable violation of the national policy set by Congress. NEPA applies to the case at bar because the Act was law at the time the Toll Highway Authority made its decision to build the extension, and the wanton disregard and destruction of

the environment alleged by Petitioners in their complaint violated the national policy.

The cases cited by Respondents, *Civic Improvement Committee* v. *Volpe*, 459 F. 2d 957 (4th Cir. 1972); *City of Boston* v. *Volpe*, ... F. 2d ....., 4 E.R.C. 1337 (1st Cir. 1972); *Eli* v. *Velde*, 451 F. 2d 1130 (4th Cir. 1971); *Miltenberger* v. *Chesapeake & Ohio Ry. Co.*, 450 F. 2d 971 (4th Cir. 1971); *Bucklein* v. *Volpe*, 2 E.R.C. 1082 (N.D. Calif. 1970), are all clearly distinguishable from the case at bar. They were all actions either predominantly or solely against federal defendants and were concerned with procedural requirements under the second section of Title I of NEPA. *City of Boston* v. *Volpe*, ... F. 2d ....., 4 E.R.C. 1337 was not only based on the procedural requirements of the second section of Title I but on the federal regulations promulgated thereunder. *See* footnote 1 at 1337. The only issue in *Civic Improvement Committee* v. *Volpe*, 459 F. 2d 957 (4th Cir. 1972) was whether a partial preliminary injunction against federal defendants should be dissolved. The court dissolved the injunction because the federal defendants had no duties under the National Environmental Policy Act because the federal defendant had nothing to do with the state project. No decision was required as to NEPA's application to state defendants and this issue was not before the court. The language in the decision regarding the fact that the project was wholly state and therefore NEPA did not apply must be taken to mean that no obligation would devolve under NEPA on federal defendants until they participated in the project. In *Bucklein* v. *Volpe*, 2 E.R.C. 1082 (N.D. Calif. 1970), the Court specifically found that

"there had been ample consideration of environmental factors. Persuasive data was produced on both sides." *Id.* at 1083. The unresearched, unargued and unconsidered statement concerning this Act is not even persuasive dicta. The district court never indicated in its opinion that it had been directed to or was familiar with Section 4331(c). The district court was considering a situation in which the federal government was the defendant. The case of *Zabel* v. *Tabb*, 430 F. 2d 199 (5th Cir. 1970), was solely against the federal government and arose prior to NEPA becoming law as specifically pointed out at p. 213 of the opinion.

Respondents have acknowledged by their silence that the decision rendered below was made in disregard of the long line of authorities of this Court and in contravention of settled rules of statutory interpretation and statutory enforcement. Petitioners on the other hand have pointed out this disregard and violation of authority repeatedly. Respondents have produced no authoritative holding to support the Court of Appeals decision below. The Act in question is an extremely important one for the national welfare, and at this time of environmental crisis the national environmental policy clearly established by Congress as a response and remedy to the environmental crisis should be supported and enforced by this Court so that the decision of the Seventh Circuit, reached without regard to the principles of law and canons of statutory interpretation pronounced by this Court, will not lead other courts in the land astray to the detriment of all.

CONCLUSION.

In view of the foregoing, we respectfully submit that the Court of Appeals opinion below is in conflict with the rulings of this Court, other Circuit Courts, Federal Statutes and Constitutional provisions on important questions of federal law; that the recently recognized federal environmental rights and duties involved herein need further definition and clarification by this Court; that the effect of the decision is to cause confusion and uncertainty in the law with the resulting loss of substantial justice to citizens of the United States and will increase rather than decrease litigation in the United States courts of review unless the supervision and correcting authority of this Court is brought into use by granting the Writ of Certiorari.

Petitioners pray that the Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be allowed in this case and that on such review by this Court the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

DAVID LINCOLN ADER, Esq.
233 East Walton Place
Chicago, Illinois 60611
312-337-6285 or 312-726-4904

Attorney for Petitioners